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5 IN THE UNITED STATES DISTRICT COURT
6 FOR THE NORTHERN DISTRICT OF CALIFORNIA
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8 JERRY E. DAVIS,

No. C 04-0939 SI

9 Plaintiff,

**ORDER GRANTING DEFENDANTS'
MOTION TO DISMISS**

10 v.

11 JOHN POTTER, Postmaster General of the United
12 States, et al.,13 Defendants.
14

15 Defendant's motion to dismiss plaintiff's complaint came on regularly for hearing on June 17, 2005.
16 After carefully considering the papers and pleadings on file and the arguments of the parties, the motion to
17 dismiss is GRANTED, for the reasons set out below.

18 **BACKGROUND**

19 This case arises out of plaintiff's employment with the United States Postal Service ("USPS"). He has
20 worked for the USPS since October 18, 1978, and for the past eleven years has been in information
21 technology in the San Mateo Integrated Business Support Service Center. Plaintiff alleges that the USPS
22 discriminated against him on the basis of his disabilities, including sleep apnea, as well as "his age (over 40),
23 race (white, i.e., reverse discrimination), religious, ethnic and national origin background (Jewish), sexual
24 orientation (gay), [and] gender (male)," in violation of the Rehabilitation Act, the Americans with Disabilities
25 Act ("ADA"), Title VII of the Civil Rights Act, and the Age Discrimination in Employment Act ("ADEA"). See
26 Compl. ¶ 19. He brings suit against the USPS and John Potter, the Postmaster General of the United States.
27 Specifically, the alleged acts of discrimination include passing plaintiff over for promotion, refusing to allow
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1 plaintiff to modify his work schedule to accommodate his sleep apnea, harassing plaintiff, “spying” on plaintiff
 2 by assigning monitors to oversee his work, and prying into his medical records. See id. at 3:1-13. Plaintiff
 3 seeks damages, back pay, lost benefits, and an injunction compelling defendant to promote him to the position
 4 of “Computer Systems Analyst Programmer, Level 20,” for which he has applied.¹ He also seeks an
 5 accommodation of his disabilities, in the form of a modified work schedule. See id. at 9; ¶ 9.

6 Although plaintiff’s complaint states that he “has exhausted all of his available administrative remedies
 7 under federal statute,” he also alleges that “it would be futile to pursue any internal administrative actions within
 8 the defendants Potter and USPS because of defendants’ hostility toward him, their unconscionable delays in
 9 considering or arbitrating his grievances, and other factors,” and that he is therefore “exempt from having to
 10 internally appeal each and every act taken against him by defendants.” Compl. ¶¶ 7, 13, 18, 22.

11 On May 2, 2005, defendant John Potter filed a motion to dismiss, arguing that (1) plaintiff failed to
 12 exhaust administrative remedies before filing suit; (2) the government cannot be sued under the ADA; and (3)
 13 discrimination based on sexual orientation is not actionable under Title VII and the ADA. That motion is now
 14 before the Court.

16 LEGAL STANDARD

17 Federal Rule of Civil Procedure 12(b)(1) allows a party to challenge a federal court's jurisdiction over
 18 the subject matter of the complaint. As the party invoking the jurisdiction of the federal court, the plaintiff bears
 19 the burden of establishing that the court has the requisite subject matter jurisdiction to grant the relief requested.
 20 See Kokkonen v. Guardian Life Ins. Co. of America, 511 U.S. 375, 376-78, 114 S.Ct. 1673, 1675 (1994)
 21 (citation omitted). A motion to dismiss under Rule 12(b)(1) of the Federal Rules of Civil Procedure for lack
 22 of subject matter jurisdiction may either “attack the allegations of the complaint or may be made as a 'speaking
 23 motion' attacking the existence of subject matter jurisdiction in fact.” Thornhill Publ'g Co. v. General Tel. And
 24 Elec., 594 F.2d 730, 733 (9th Cir. 1979) (citing Land v. Dollars, 330 U.S. 731, 735 n. 4. (1947)). Where
 25 the jurisdictional issue is separable from the merits of the case, the court need only consider evidence related
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 28 ¹ Plaintiff filed a grievance based on the USPS’s failure to promote him to the position of computer
 systems analyst/programmer level 20, which was denied after arbitration. Arbuckle Decl., Ex. C.

1 to the jurisdiction issue, and rule on that issue, resolving factual disputes as necessary. Id. (citing Berardinelli
 2 v. Castle & Cooke, Inc., 587 F.2d 37 (9th Cir. 1978))

3 4 DISCUSSION

5 1. Exhaustion of administrative remedies

6 Defendant contends that plaintiff's Rehabilitation Act, Title VII, and ADEA claims must be dismissed
 7 because exhaustion of administrative remedies is required before a claim may be filed under any of these
 8 statutes, and plaintiff has not exhausted administrative remedies.

9 Before a federal employee may file a complaint under Title VII or the Rehabilitation Act, he or she must
 10 participate in the EEO process, which includes submitting an informal complaint to an EEO counselor and
 11 subsequently filing a formal EEO complaint with the agency employer. 29 C.F.R. §§ 1614.105(a)(1),
 12 1614.106(b); see also Sommatino v. United States, 255 F.3d 704, 707-08 (9th Cir. 2001). Once the agency
 13 issues a final decision on the formal complaint, the employee may appeal this decision either to the EEOC or
 14 to a district court. 29 C.F.R. § 1614.110. The Ninth Circuit has held that Title VII's exhaustion requirements
 15 are not jurisdictional and may be subject to the doctrines of waiver, estoppel, and equitable tolling, but that
 16 "substantial compliance with the presentment of discrimination complaints to an appropriate administrative
 17 agency is a jurisdictional prerequisite." Sommatino, 255 F.3d at 708. Thus, "where a plaintiff has *never*
 18 presented a discrimination complaint to the appropriate administrative authority," a district court lacks subject
 19 matter jurisdiction. Id. at 709 (emphasis added). In addition, Title VII's exhaustion requirements are
 20 applicable to claims made under the Rehabilitation Act. See Boyd v. U.S. Postal Service, 752 F.2d 410, 413-
 21 14 (9th Cir. 1985). Under the ADEA, a federal employee must either pursue the administrative process or file
 22 with the EEOC a written notice of his intent to file a civil action at least 30 days before filing the action in district
 23 court. 29 U.S.C. § 633a(d); 29 C.F.R. § 1614.201(a).

24 Defendant argues that plaintiff never complied with any of these exhaustion requirements despite his
 25 actual knowledge of the required procedures. It is undisputed that plaintiff received notice about the proper
 26 procedures in the course of his employment with the USPS through EEO posters in his workplace. Stange
 27 Decl. ¶ 2; Arbuckle Decl., Ex. B at 146:15-21. Plaintiff made verbal complaints via telephone to the USPS
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1 EEO counselors in Washington, D.C. on August 22, 2003, October 6, 2003, November 13, 2003, and
 2 November 28, 2003, and after each telephone contact, USPS mailed him an EEO package containing
 3 information about the EEO process and ADEA procedures and a form to request EEO counseling. DeSorbo
 4 Decl. ¶ 2; Arbuckle Decl., Ex. B at 191:1-192:23. Plaintiff never returned any of the pre-complaint counseling
 5 forms provided in the EEO packages or filed a complaint with the EEOC or a notice of intent to sue the USPS.
 6 DeSorbo Decl. ¶ 2; Arbuckle Decl., Ex. B at 53:1-4, 69:21-70:6. Beyond his verbal complaints, plaintiff's
 7 sole attempt to initiate his administrative process was a letter from his counsel to the USPS, dated January 3,
 8 2004, entitled "Formal EEO Complaint" and stating "This is a formal EEO Complaint of Discrimination, which
 9 I am sending to you prior to filing a federal lawsuit in federal court." Arbuckle Decl., Ex. B at 186:7-10; Ex.
 10 E.

11 Plaintiff apparently mistakes defendant's motion to dismiss for lack of subject matter jurisdiction under
 12 Rule 12(b)(1) for a motion to dismiss for failure to state a claim under Rule 12(b)(6).² A lack of subject matter
 13 jurisdiction, if found, is fatal and cannot be cured by amendment. See Fed. R. Civ. P. 12(h)(3) ("Whenever
 14 it appears by suggestion of the parties or otherwise that the court lacks jurisdiction of the subject matter, the
 15 court shall dismiss the action.").³

16 The issue here is whether plaintiff's actions are sufficient to constitute "substantial compliance" with the
 17 exhaustion requirements of Title VII, the Rehabilitation Act, or the ADEA. The Court finds that they are not.
 18 Plaintiff's verbal complaints, without follow-up in the form of any informal requests for counseling or formal
 19 EEO complaints, and the January 3, 2004 letter from his counsel did not engage the administrative process so
 20 that the EEOC or the USPS could investigate and address his allegations of discrimination. See Sommatino,
 21 255 F.3d at 710. It is undisputed that plaintiff did not participate in EEO counseling, did not file a formal EEO
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 24 ² Defendant's Rule 12(b)(1) motion pertains to the Title VII, Rehabilitation Act, and ADEA claims,
 but not to his ADA claim. Defendant seeks dismissal of the ADA claim on separate grounds.

25 ³ Plaintiff's counsel also argues that defendant's motion is a "thinly disguised motion for summary
 26 judgment," see Pl.'s Opp'n at 12:12-13, because defendant has submitted declarations and otherwise
 27 provided evidentiary support for its arguments. While a 12(b)(6) motion is based solely upon the pleadings
 28 in a matter, a court ruling on a Rule 12(b)(1) motion consider evidence related to the jurisdictional issue, and
 the plaintiff bears the burden of proof to establish jurisdiction. Thornhill Publ'g, supra, 594 F.2d at 733. In
 addition, because defendant's motion is not a motion for summary judgment, plaintiff's request for discovery
 pursuant to Rule 56(f) is DENIED.

1 complaint, and did not notify the USPS of his intent to sue under the ADEA or otherwise comply with the
2 ADEA administrative process. Moreover, even if the Court considered the January 3, 2004 letter a proper
3 EEO complaint or intent-to-sue notice, it is undisputed that plaintiff did not receive a final agency decision
4 before filing suit.

5 Plaintiff's argument that administrative exhaustion would be "futile" and that he is "exempt" from
6 undertaking administrative appeals is unavailing. In support of this argument, plaintiff alleges that USPS
7 employees engaged in "delay tactics" and that a union representative told him to defer any EEO complaint until
8 the end of arbitration of his union grievance. In the Ninth Circuit, a plaintiff must offer more than "purely
9 speculative" "allegations of bias" to establish futility; there must be "objective and undisputed evidence of
10 administrative bias." Anderson v. Babbitt, 230 F.3d 1158, 1164 (9th Cir. 2000). Here, plaintiff has presented
11 no such evidence of bias, but rather admits that he simply had "an overall impression, feeling" that the EEO
12 counselors he contacted were not there to help him. Arbuckle Decl., Ex. B at 25:8-22. In addition, plaintiff's
13 allegation that a union representative advised plaintiff against filing an EEO complaint until later in the
14 proceedings does not help him, because plaintiff did not ever file, or attempt to file, an administrative complaint.
15 Sommatino, 255 F.3d at 710 (finding that equitable estoppel did not apply where an EEO counselor
16 discouraged plaintiff from filing a complaint, because no administrative complaint was ever filed). On this
17 record, the Court cannot conclude that plaintiff is exempt from the exhaustion requirements on grounds of
18 futility.

19 For these reasons, defendant's motion to dismiss the first, third, and fourth causes of action is
20 GRANTED. These claims are DISMISSED without prejudice to refile if and when plaintiff exhausts his
21 administrative remedies.

22 23 **2. ADA claim**

24 Defendant also contends that plaintiff's ADA claim, in the second cause of action, must be dismissed
25 because the federal government may not be sued under this statute. Plaintiff does not address this argument
26 in his Opposition, and the statute appears to forbid any suit against the USPS. 42 U.S.C. § 12111(5)(B)(i)
27 provides that an "employer" under the ADA "does not include . . . the United States, a corporation wholly
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1 owned by the government of the United States, or an Indian tribe.” The Ninth Circuit has held that this
2 language specifically exempts the federal government from suit under the ADA. See Zimmerman v. Oregon
3 Dep’t of Justice, 170 F.3d 1169, 1172 (9th Cir. 1999). Accordingly, plaintiff’s second cause of action is
4 DISMISSED with prejudice.

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6 **3. Sexual orientation discrimination**

7 As part of plaintiff’s Title VII and ADEA claims, he alleges that he was discriminated against on the
8 basis of his sexual orientation. Compl. ¶¶ 19, 23. Defendant argues that this form of discrimination is not
9 protected under these statutes and cannot form the basis of plaintiff’s claims. See Rene v. MGM Grand Hotel,
10 Inc., 243 F.3d 1206, 1209 (9th Cir. 2001)(Title VII); 29 U.S.C. § 633a; 42 U.S.C. § 6101. Because the
11 Court finds that these claims must be dismissed for lack of subject matter jurisdiction, however, it need not
12 decide this separate ground.

13
14 **CONCLUSION**

15 For the foregoing reasons and for good cause shown, the Court hereby GRANTS defendant’s motion
16 to dismiss. [Docket # 25] The clerk shall close the file.

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18 **IT IS SO ORDERED.**

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20 Dated: June 17, 2005

21 S/SUSAN ILLSTON
22 SUSAN ILLSTON
23 United States District Judge
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